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IN THE

Supreme Court of the United States

October Term, 1957

TEXAS PLASTICS, INC. and FRED J. MEYER,

Petitioners,

—vs.—

ROTO-LITH, LTD. and HARRY BORAK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Opinions Below

The opinion of the District Court is unreported but is set forth in R. 749-759. The opinion of the United States Court of Appeals for the Fifth Circuit affirming the District Court is reported in 250 F. (2d) 844.

Jurisdiction

The judgment of the Court of Appeals was entered on January 9th, 1958. No motion for rehearing was filed. The petition for Writ of Certiorari was filed April 9, 1958 and jurisdiction of this Court is invoked under 28 USC 1254 (1).

No Constitutional or Statutory Question Involved

This case does not involve a constitutional question, statute or regulation.

Questions Presented

Whether the form of Jury Verdict prepared by the trial court shall be disregarded when no objection was made either before or after submission, and the jury was fully charged with respect to use of the form.

Statement

The only question before this Court is the form of the jury verdict. This question, among many others, was passed upon by the District Court in overruling Petitioners' motion for new trial, and was clearly rejected as without merit by the United States Court of Appeals for the Fifth Circuit in their affirmance of the District Court's judgment.

The suit was brought by Roto-Lith, Ltd., a corporation and Harry Borak, its President against Texas Plastics, Inc., and its General Manager Fred J. Meyer, for actual and exemplary damages arising out of slander uttered by

the defendant Meyer in the scope of his employment as General Manager of the corporate defendant. Final judgment was rendered against the defendants and in favor of plaintiffs in the sum of $50,000.00.

Argument

Three issues were submitted to the jury after the Court's charge:

1. Actual Damages
2. Exemplary Damages
3. Defendants Verdict

No objection was made by the defendants to the forms prepared and submitted by the trial judge.[1] With regard to the forms, the Court charged the jury, again without objection from defendants, as follows:

> "Now for that reason, I have worded a form of verdict which you may or may not use, as it may suit your convenience; *first, in the event of a verdict*

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[1] This form, as completed by the jury, is here duplicated:

"VERDICT OF THE JURY.
Filed May 26, 1956.

We, the jury find for the plaintiff, Roto-Lith, Ltd., and against the defendants for $25,000.00 damages.

We further find for the plaintiffs and against the defendants, Texas Plastics, Inc., and/or Fred J. Meyer, exemplary damages in the sum of $50,000.00.

HUBERT K. PORTER,
Foreman.

or

We, the jury, find for the defendants.

.....,
Foreman."

for the plaintiffs, 'We, the jury, find for the plaintiff, Roto-Lith, Ltd., and against the defendants, for blank damage.' I mean there the nominal or actual damages that you may see fit to award. Now the second section, 'We further find *for the plaintiffs* and against the defendant Texas Plastics, Inc., and/or Fred J. Meyer, exemplary damages in the sum of blank dollars.' If you determine that exemplary damages should be awarded, then you will determine whether or not they should be awarded solely against the man making the statement or against Texas Plastics or against both, and you can strike out 'and/or' and strike out either one of those names, just whatever you find. I am just simply trying to assist you. The third form of a verdict is in the event of a verdict for the defendants, 'We, the jury, find for the defendants.'"

The jury entered its verdict on the form prepared by the trial judge. Final judgment was rendered against the defendants and in favor of plaintiffs in the sum of $50,000.00. No apportionment was made as between the plaintiffs, but this is not harmful to defendants, since the judgment against them can be wholly satisfied by payment to the plaintiffs jointly as in the form of the judgment.

The sufficiency of the verdict can scarcely be questioned when the Court charged the jury to use a given form in the event they made certain findings (no objection having been lodged against the charge or form), and the jury did exactly *as it was authorized to do*. If petitioners had desired a different form setting out the parties separately, they had ample opportunity to object to the form presented as well as to the charge. Petitioners are not now in position to say that the verdict means anything different

from what the Court charged the jury it would mean. The question is well resolved by the language of Judge Tuttle appearing at page 17 of Petitioners' brief where he said:

> *"In light of the charge to the jury quoted above, we have no doubt as to the correctness of this action by the trial court.* The court had specifically stated to the jury that if they found a verdict for both the plaintiffs they could use the written form prepared by the court provided: 'We, the jury, find for the plaintiff, Roto-Lith, Ltd.' *In the absence of any objection by the defendants* that there was an inconsistency in this form of verdict and in view of the fact that there was never any issue in the case which would have made a recovery for Borak stand on any different basis from a recovery for Roto-Lith, Ltd., *we see no reason why the jury's verdict should not be taken to mean exactly what the trial court said it did mean when he submitted the form to them for their action.* We therefore hold that the verdict of the jury was properly construed by the court to constitute a joint verdict in favor of the plaintiffs against the defendants."

A similar matter was passed upon in *Boice* v. *Bradley*, 92 F. Supp. 750 affirmed 194 F. (2d) 80, Writ denied 72 SC 1033 wherein the court said:

> "The jury was advised as to the limit it could go in assessing damages against the defendant. For the Court to say to a jury, this you can do, and then when the jury has acted, say that it acted wrongly, discredits the Court if the Court on that ground set aside the verdict."

The conclusion by the District Court and the Circuit Court that the jury found both plaintiffs entitled to actual

damages for the defendants' tort answers petitioners' contention with respect to exemplary damages, and therefore the cases cited by petitioner are distinct from the case at bar.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

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